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Lee Choon Hei v Cheah Boon Hoe (formerly the principal owner of the firm Messrs Paul Cheah & Assoc and now practising under the name of Messrs Paul Cheah Assoc)

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HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-258–05 OF 2019
ONG CHEE KWAN JC
C 27 DECEMBER 2019

Legal profession — Indemnity — Indemnity pursuant to the partnership agreement by principal owner — Whether defendant principal owner — Whether plaintiff's claim pre-mature

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This was the plaintiff's application seeking an indemnity from the defendant pursuant to a partnership agreement. The plaintiff was the branch partner of Messrs Paul Cheah & Assoc >('the firm') located at Port Klang ('the Port Klang
E Branch') from 14 July 2006–30 June 2008. The defendant was the principal owner and partner of the firm. The firm was sued by Public Bank Bhd ('the bank') for loss and damages arising from a fraudulent and/or negligence action of Frankie Tan Lyn Seng ('Mr Frankie Tan') who was a partner in the firm's KL branch ('the 165 Suit') the bank had obtained judgment against the firm for a
F sum of RM561,413.02 with interests and costs of RM180,000 ('the judgment sum'). The plaintiff claimed that he was not aware of the 165 Suit until late 2014. The plaintiff's maintained that: (a) his relationship with the defendant had continued to be governed through the period from the time he signed the agreement to the time of his resignation; (b) the defendant continued to be
G entitled to 50% of the profit of the firm even when he became the consultant of the firm and continued to draw the monthly sum of RM2,000 as provided in the Appendix of the partnership agreement; and (c) the third party action was never considered by the High Court when it was dismissed therefore res judicata did not apply. The defendant averred that: (i) he had ceased to be a
H partner of the firm as at 1 August 2006 and was merely a consultant of the firm; (ii) the plaintiff's action was barred by the doctrine of res judicata as the plaintiff had previously filed a third party action against him in the 165 Suit which was dismissed and that there was no appeal against the dismissal; (iii) that the plaintiff's claim for indemnity was pre-mature as the plaintiff had yet
I to make any payment of the judgement sum to the bank; and (iv) the plaintiff was incompetent to maintain any action as without the previous sanction of the Director General of Insolvency (DGI) as a bankruptcy order was made against the plaintiff. Issues to be determined by the court was whether: (1) the defendant was a partner of the firm during the period when the plaintiff was the

branch partner; (2) whether res judicata applied; and (3) whether the plaintiff's claim was pre-mature. A

Held, allowing the action with costs of RM25,000:

(1) The defendant was identified as the principal owner of the firm in the partnership agreement and was entitled to 50% of the profits and losses of the Port Klang Branch. It was also clear that the defendant played a significant role in the financial and management matters of the Port Klang Branch which continued to be exercised by the defendant notwithstanding his resignation as senior partner of the firm and assuming the designation of consultant. Evidence also suggested that the defendant's designation as consultant was more form than substance. The plaintiff had discharged his burden when he established that the terms of the partnership agreement had continued to govern his relationship with the defendant. The defendant was indeed a partner of the firm notwithstanding his letter to the Bar Council notifying his retirement as senior partner and his re-designation of his role as consultant to the Firm. His position as the principal owner had not changed. Accordingly, the court agreed with the plaintiff that the defendant was liable to indemnify him for the judgment sum. (see paras 21–22 & 25–28). B C D E

(2) Based on the order dated 11 November 2015, it was apparent that the third party notice was terminated pursuant to O 16 r 4(3) of the Rules of Court 2012 following the court's order setting aside the plaintiff's notice for third party directions. This suggested that the claims were never considered by the court at all (see para 30). F

(3) With regards to whether the plaintiff's claim was premature, with reference to *Mat Abu bin Man v Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226 the cause of action should begin to run from the date the defendant was held liable (see para 31). G

[Bahasa Malaysia summary

Ini merupakan permohonan plaintif untuk perlindungan daripada defendan selaras dengan satu perjanjian perkongsian. Plaintif merupakan rakan kongsi cawangan Tetuan Paul Cheah & Assoc ('firma tersebut') terletak di Port Klang ('cawangan Port Klang') daripada 17 Julai 2006–30 Jun 2008. Defendan merupakan pemilik prinsipal dan rakan kongsi firma tersebut. Firma tersebut telah di saman oleh Public Bank Bhd ('bank tersebut') untuk ganti rugi yang timbul daripada tindakan frod dan/atau kecuaian Frankie Tan Lyn Seng ('En Frankie Tan') yang merupakan seorang rakan kongsi cawangan KL firma tersebut ('guaman 165') bank telah mendapat penghakiman terhadap firma tersebut untuk jumlah RM561,413.02 berserta faedah dan kos RM180,000 ('jumlah penghakiman tersebut'). Plaintif mengatakan bahawa dia tiada pengetahuan mengenai guaman 165 tersebut sehingga lewat 2014. Plaintif H I

menegaskan bahawa: (a) hubungan antara defendan ditadbir melalui tempoh masa dia menandatangani perjanjian tersebut sehingga beliau meletakkan jawatan; (b) defendan masih layan kepada 50% keuntungan firma tersebut walaupun apabila dia menjadi perunding firma tersebut dan terus untuk mendapat jumlah bulanan RM2,000 seperti tertakluk dalam lampiran perjanjian perkongsian tersebut; dan (c) tindakan pihak ketiga tidak pernah dipertimbangkan Mahkamah Tinggi apabila ianya diketepikan dan oleh itu, res judicata tidak terpakai. Defendan mengatakan bahawa (i) dia berhenti untuk menjadi rakan kongsi firma tersebut setakat 1 Ogos 2006 dan hanya dikira sebagai perunding firma tersebut; (ii) tindakan plaintif dihalang oleh doktrin res judicata kerana plaintif telah sebelum ini memfailkan tindakan pihak ketiga terhadapnya dalam guaman 165 yang telah ditolak dan tiada rayuan terhadap penolakan tersebut; (iii) bahawa tuntutan plaintif adalah pra-matang kerana plaintif belum lagi membuat apa-apa bayaran kepada bank; dan (iv) plaintif tidak kompeten untuk meneruskan apa-apa tindakan tanpa sanksi daripada Ketua Pengarah Insolvensi (KPI) kerana satu perintah kebankrapan telah dibuat terhadap plaintif. Isu untuk diputuskan oleh mahkamah adalah sama ada: (1) defendan merupakan rakan kongsi firma tersebut dalam tempoh plaintif merupakan rakan kongsi cawangan; (2) sama ada res judicata terpakai; dan (3) sama ada tuntutan plaintif adalah pra-matang.

Diputuskan, membenarkan tuntutan dengan kos RM25,000:

(1) Defendan dikenalpasti sebagai pemilik prinsipal firma dalam perjanjian perkongsian dan berhak kepada 50% keuntungan dan kerugian cawagan Port Klang. Ianya juga jelas bahawa defendan memainkan peranan signifikan dalam urusan pengurusan dan keewangan cawangan Port Klang yang masih dilaksanakan oleh defendan tanpa mengambilkira peletakkan jawatannya sebagai rakan kongsi kanan firma tersebut dan mengambil gelaran perunding. Keterangan juga mencadangkan bahawa gelaran defendan sebagai perunding lebih dari bentuk dari intipati. Plaintif telah melepaskan bebannya apabila dia membuktikan bahawa terma perjanjian perkongsian terus mentadbir hubungnya dengan defendan. Defendan merupakan rakan kongsi firma meskipun terdapat suratnya kepada Majlis Peguam memaklumkan persaraannya sebagai rakan kongsi kanan dan pengelaran semulanya sebagai perunding kepada firma. Kedudukannya sebagai pemilik prinsipal tidak berubah. Oleh itu, mahkamah bersetuju dengan plaintif bahawa defendan bertanggungan untuk memberi pelindungan kepadanya untuk jumlah penghakiman tersebut (lihat perenggan 21–22 & 25–28).

(2) Berdasarkan perintah bertarikh 11 November 2015, adalah jelas bahawa notis pihak ketiga telah ditamatkan selaras dengan A 16 k 4(3) Kaedah-Kaedah Mahkamah 2012 selaras dengan perintah mahkamah menolak notis plaintif untuk arahan pihak ketiga. Ini mencadangkan

bahawa pengataan tersebut tidak pernah dipertimbangkan oleh mahkamah langsung (lihat perenggan 30).

(3) Berkenaan dengan isu sama ada tuntutan plaintif adalah pra-matang, dengan rujukan kepada *Mat Abu bin Man v Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226 kausa tindakan sepatutnya bermula dari tarikh defendan didapati bertanggungan (lihat perenggan 31).]

Cases referred to

Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors [1989] 1 MLJ 226, FC (refd)

Legislation referred to

Insolvency Act 1967 (now Bankruptcy Act 1967) s 38(1)(a)
High Court Rules 2012 O 16 r 4(3)

Jerry Ling Ting Yuen (Lee Ling & Partners) for the plaintiff.
Koo Thean Chiap (Paul Cheah Assoc) for the defendant.

Ong Chee Kwan JC:

[1] The plaintiff was the branch partner of the law firm Messrs Paul Cheah & Associates ('the firm') located at Port Klang from 14 July 2006–30 June 2008 ('Port Klang branch').

[2] Under the partnership agreement that he had with the firm, cl 19.1 states:

> The Law Firm/Principal Owner shall at all material times indemnify the Branch Partner against all losses, damages, actions, negligence suit or any form of legal proceedings taken against the Partnership in respect of or any action arising from the Kuala Lumpur, Subang Jaya, and Klang branches whether by its staff or legal assistants (if any).

[3] On 25 January 2011, Public Bank Bhd ('the bank') sued the firm at the Kuala Lumpur High Court in Civil Suit No D-22NCC-165 of 2011 ('the 165 suit') for loss and damages arising from a fraudulent and or negligence action by one Frankie Tan Lyn Seang ('Mr Frankie Tan'), a partner in the firm's Kuala Lumpur branch ('KL branch'). The bank subsequently obtained judgment against the firm for the sum of RM561,413.02 with interests and costs of RM180,000 ('the judgment sum').

[4] The plaintiff was not aware of the 165 suit until sometime in late 2014 when the bank took out an application seeking leave to enforce the judgment

sum against each of the partners of the firm.

[5] In this action, the plaintiff is seeking an indemnity from the defendant as the principal owner and partner of the firm under the partnership agreement. The remaining partners of the firm, Mr Venu Nair and En Sulaiman bin Mohd Said have passed away. Mr Frankie Tan himself has been made a bankrupt.

[6] The defendant's main defence to the plaintiff's claim is that he had ceased to be a partner of the firm as at 1 August 2006 and was merely a consultant of the firm thereafter. The defendant further averred that the plaintiff's action is barred by the doctrine of res judicata.

THE DEFENDANT'S CASE

[7] In respect of the plaintiff's claim, the court has to determine as a matter of fact and law whether the defendant was a partner of the firm during the period when the plaintiff was the branch partner.

[8] According to the defendant, as at 1 August 2006 he had resigned as the senior partner of the firm and took on the position as a consultant instead. The defendant referred to his letter to the Bar Council dated 26 June 2006 as proof of his assertion. The letter stated:

> 26th June 2006
>
> Bar Council,
>
> No 13, 15 & 17,
>
> Leboh Pasar Besar,
>
> 50050 Kuala Lumpur
>
> Attention: Membership Department
>
> Dear Sirs
>
> Re : CHEAH BOON HOE (BC/C/296)
>
> Kindly be informed that our Mr Cheah Boon Hoe is appointed as a Consultant of M/s Paul Cheah & Associates with effect from 1st August, 2006. Accordingly, our Mr Cheah will resign as the Senior Partner of Messrs Paul Cheah & Associates.
>
> Your immediate attention and cooperation is appreciated.
>
> Thank you.
>
> Yours faithfully,
>
> (signed)
>
> .....

PAUL CHEAH & ASSOCIATES

[9] The defendant also referred to the firm's accountant's report for the year ended 31 December 2006 dated 7 December 2007 ('the 2006 accountant report') and 31 December 2007 dated 26 December 2008 ('the 2007 accountant report'). In particular, in the 2006 accountant report, there is a notation next to the defendant's name stating that he had resigned on 1 August 2006. As for the 2007 accountant report, the defendant's name no longer appeared in the particulars of solicitors of the firm.

[10] Further, the defendant gave oral testimony that the plaintiff was fully aware of the fact of his 'retirement and resignation' and his new role as 'consultant' of the firm.

[11] On the issue of res judicata, the defendant referred to the plaintiff's third-party action that was filed against him by the plaintiff in the 165 suit. In this third-party action, the plaintiff had similarly relied on cl 19.1 of the partnership agreement to seek an indemnity against the defendant.

[12] According to the defendant, the third-party action was dismissed by the High Court on 11 November 2015 and there was no appeal by the plaintiff against the dismissal. On this ground, the defendant says that the plaintiff's present action is no longer sustainable by reason of the doctrine of res judicata.

[13] The defendant's other ground is that the plaintiff's claim for indemnity is pre-mature as the plaintiff has yet to make any payment of the judgment sum to the bank.

[14] Another point that was taken up relates to an event that took place after the completion of the trial. During the oral submissions, it was disclosed by learned counsel for the plaintiff that a bankruptcy order had been made against the plaintiff on 9 December 2019. The court had directed the attention of the plaintiff to s 38(1)(a) of the Insolvency Act 1967 which states that a bankrupt shall be incompetent to maintain any action without the previous sanction from the Director General of Insolvency ('DGI'). Learned counsel for the plaintiff then informed the court that he would be seeking the sanction from the DGI to permit the plaintiff to continue with the action.

[15] Learned counsel for the defendant thereafter filed further submission seeking for the action to be dismissed based on the plaintiff's bankruptcy.

THE PLAINTIFF'S CASE

[16] The plaintiff maintained that his relationship with the defendant had continued to be governed by the terms of the partnership agreement throughout the period from the time he signed the agreement on 14 July 2006 until his resignation on 30 June 2008.

[17] The defendant had continued to be entitled to 50% of the profit of the Port Klang Branch even after 1 August 2006 when the defendant had purportedly become a consultant of the firm. In fact, the defendant himself did not dispute that he had continued to draw the monthly sum of RM2,000 as provided in the appendix to the partnership agreement.

[18] The plaintiff maintained that neither the defendant nor the firm had ever informed him of the defendant's resignation as the senior partner of the firm and assuming the role as a consultant as at 1 August 2006.

[19] As regards the third-party action, it is the plaintiff's case that the merits of his third-party action against the defendant was never considered and determined by the High Court when the same was dismissed. As such, the doctrine of res judicata simply does not apply.

THE COURT'S FINDING

[20] The defendant has not been able to adduce any evidence before the court that his relationship with the plaintiff during the period from 14 July 2006–30 June 2008 was no longer regulated by the terms of the partnership agreement. In fact, the defendant admitted during cross-examination that the partnership agreement was not varied or amended at all after he assumed the role as consultant to the firm on 1 August 2006.

[21] It is pertinent to note that the defendant was identified as the 'principal owner' of the firm and under cl 6.1(b) of the partnership agreement, he was entitled to 50% of the profits and losses of the Port Klang Branch.

[22] Further, under cll 7 and 13 of the partnership agreement, it is clear that the defendant played a significant role in the financial and management matters of the Port Klang Branch as well. These roles continued to be exercised by the defendant notwithstanding his 'resignation' as senior partner of the firm and assuming the designation as 'consultant' to the firm since the partnership agreement was never varied or amended. This is acknowledged by the defendant when he confirmed that he continued to received RM2,000 a month because the parties had agreed to the same under the partnership agreement.

[23] I find that notwithstanding the defendant's oral testimony that the plaintiff was informed of his resignation as senior partner of the firm, the plaintiff was in fact not told of the same throughout the period when he was the branch partner of the firm.

[24] The letter dated 26 June 2006 that was issued by the defendant to the Bar Council was never copied to the plaintiff. There is also no evidence that the 2006 accountant report and the 2007 accountant report were ever furnished to the plaintiff whilst he was the branch partner of the Port Klang Branch.

[25] In fact, there is evidence that suggests that the defendant's designation as 'consultant' of the firm was more form than substance. My reasons for saying so are as follows:

(a) when the plaintiff ceased as the branch partner of the Port Klang Branch and left the firm, the defendant caused to be issued to the manager of Public Bank Bhd, Klang Branch that the plaintiff had withdrawn from the firm and was no longer authorised to sign any cheques for the firm. However, no such similar letters were issued when the defendant ceased to be senior partner of the firm. In fact, during cross-examination, the defendant confirmed that neither he nor the firm had issued any letter or notice to the firm's clients of his retirement from the firm;

(b) the defendant continued to be entitled to share in the profits and losses of the firm without any change despite his purported 'retirement'. As can be seen from cl 6.1 of the partnership agreement, the defendant was entitled to 100% of the profits and losses of the firm's KL Branch which was regarded as the head office and he shared only with Frankie Tan in the profit and losses of the firm's Subang Jaya Branch and the Klang Branch;

(c) the defendant has not produced any documents on his arrangement with the firm as its consultant as at 1 August 2006 to show that he was no longer a partner of the firm;

(d) the defendant has not produced any documents to show that all or any of his entitlements as a partner of the firm had ceased upon his assumption of his role as the consultant of the firm; and

(e) there is no evidence to show that the defendant's shares in the port klang branch had been transferred out to another partner. Throughout 2006–2008, the plaintiff had continued to deal with the defendant as the partner entitled to 50% of the profit and loss of the Port Klang Branch.

[26] The plaintiff who is asserting that the defendant had continued to be a partner of the firm, bears the burden to prove on the balance of probabilities that the defendant's status had in truth not changed notwithstanding his new designation as 'consultant'. In my mind, the plaintiff had discharged his

A burden when he established that the terms of the partnership agreement had continued to govern his relationship with the defendant. The evidential burden then shifts to the defendant to show that his position in the firm had indeed changed.

B **[27]** The issue of the existence of a partnership is not to be decided merely by what the parties called each other or by the manner in which the party labelled his position. Whether a person is to be treated in law as a partner depends on an examination of the real substance of his relationship with others. Where the necessary elements of a partnership exist in fact, a relationship will be construed C as a partnership in law even though the parties may say no.

[28] In the present case, I find that the defendant was indeed a partner of the firm notwithstanding his letter to the Bar Council on 26 June 2006 notifying his retirement as senior partner and his re-designation of his role as consultant D to the firm. In every aspect, the defendant's position as the principal owner had not changed. Accordingly, I agree with the plaintiff that the defendant is liable to indemnify him for the judgment sum.

E **[29]** On the issue of res judicata, the burden is on the defendant to show that the High Court had in the 165 suit determined the plaintiff's third-party action on its merits. No evidence has been placed before the court that this was the case. A perusal of the written submissions of counsel for the defendant in respect of the third-party action shows that a good part of the same had dealt F with procedural irregularities in the third-party action. The minutes of the learned judge who dismissed the third-party action was not produced before the court.

[30] However, based on the order dated 11 November 2015, it is apparent G that the third-party notice filed by the plaintiff in suit 165 was terminated pursuant to O 16 r 4(3) of the High Court Rules 2012 following the court's order setting aside the plaintiff's notice for third party directions dated 20 January 2015. This suggests that the merits of the plaintiff's third-party claims were never considered and determined by the court at all.

H **[31]** On the question as to whether the plaintiff's claim is pre-mature as he has not made any payment of the judgment sum to the bank, I need only refer to the Federal Court case of *Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226 where it was held I that for an indemnity claim, the cause of action should begin to run from the date the defendant is held liable.

[32] Finally, on the issue of the plaintiff's bankruptcy, the plaintiff has on 23 December 2019 obtained an order staying the adjudication order and

receiving order dated 9–27 December 2019 which is the date fixed for further submission and decision by this court.

[33] Given that the bankruptcy order has been stayed, the defendant's objection to the action is no longer valid.

CONCLUSION

[34] Accordingly, I allow the plaintiff's action against the defendant and hereby grant the plaintiff order in terms of prayers (i)(a), (b) and (c), prayer (ii) of para 15 of the statement of claim with costs fixed at RM25,000.

Action allowed with costs of RM25,000.

Reported by Izzat Fauzan